

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH TATE,

Defendant-Appellant.

UNPUBLISHED

January 25, 2007

No. 264416

Wayne Circuit Court

LC No. 05-002483-01

Before: Saad, P.J., and Cavanagh and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for possession of a firearm by a felon, MCL 750.224f, carrying a concealed weapon, MCL 750.227, possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 23 months to five years' imprisonment for the possession of a firearm by a felon and carrying a concealed weapon convictions, 23 months to four years' imprisonment for the possession of heroin conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. FACTS

While on patrol, Detroit Police Officers Stewart and Jones witnessed defendant standing in the street near the driver's side of a parked vehicle while defendant was engaged in a conversation with the vehicle's occupants. Defendant's presence in the street forced another vehicle to swerve and drive into oncoming traffic. This caught Stewart's attention because it is illegal to walk or stand in the street where sidewalks are available in the city of Detroit. Stewart approached defendant to inform him of the ordinance. As Stewart approached, defendant reached toward his back pocket for his identification with his left hand and lifted up his coat. Stewart observed what appeared to be the butt of a handgun protruding from defendant's waistband. Responding to this observation, Stewart grabbed defendant and told Jones to place defendant in handcuffs. The officers found a handgun and what they believed to be narcotics in the form of nine small packets in defendant's possession.

II. WARRANTLESS ARREST

Defendant first argues that he is entitled to a new trial because he was subjected to an unconstitutional seizure. We disagree.

A. Standard of Review

Defendant failed to preserve this issue by bringing a motion to suppress the evidence before the trial court. *People v Gentner, Inc*, 262 Mich App 363, 368; 686 NW2d 752 (2004). Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

B. Analysis

"The United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); see also US Const, Am IV; Const 1963, art 1, § 11. "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v Ohio*, 392 US 1, 22; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Exigent circumstances, consent, and plain view are all recognized exceptions to the warrant requirement. *People v Wilkens*, 267 Mich App 728, 734; 705 NW2d 728 (2005). "The plain view doctrine allows police officers to seize, without a warrant, items in plain view if the officers are lawfully in a position from which they view the item, and if the item's incriminating character is immediately apparent." *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). Whether exigent circumstances exist depends on a number of factors, including an officer's reasonable belief that the defendant is armed and the need to ensure the safety of the officers involved or other citizens. *People v Oliver*, 417 Mich 366, 384; 338 NW2d 167 (1983). Furthermore, a peace officer, without a warrant, may arrest a person if "[a] felony, misdemeanor, or ordinance violation is committed in the peace officer's presence." MCL 764.15(1)(a).

In this instance, Stewart and Jones, testified at trial that they observed defendant walking in a street and obstructing traffic in violation of a Detroit city ordinance. Stewart followed defendant with the intention of informing him of the city ordinance. As Stewart approached defendant, and before either officer said anything to defendant, defendant voluntarily began to reach toward his back pocket with his left hand and lifted up his coat on the left side, indicating that he was reaching for his identification. As defendant reached for his back pocket, Stewart looked at defendant's left side waistband and saw, in plain view, what he believed was the butt of a handgun protruding from defendant's waistband. It was at this point that Stewart grabbed defendant and told Jones to place defendant in handcuffs. The officers' testimony revealed that defendant was taken into custody because of the potential threat of the weapon and safety concerns posed by that threat. Contrary to defendant's argument, defendant was not seized without specific and articulable facts giving rise to a reasonable suspicion that defendant had committed or was committing a crime. Not only had defendant violated a city ordinance, a permissible reason for arresting him, MCL 764.15(1)(a), but he exposed a concealed weapon while reaching for his identification. Accordingly, we conclude that the officers' seizure of defendant was reasonable, and defendant has failed to demonstrate that error occurred.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that prosecutorial misconduct during closing arguments denied him a fair trial. Again, we disagree.

A. Standard of Review

Defendant failed to timely and specifically object to the alleged improper comments. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). As a result, we also review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763. "[T]he propriety of a prosecutor's remarks depend upon the particular facts of each case." *Callon, supra* at 330. Therefore, we must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context and in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.* As a general rule, "[a] prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

B. Analysis

A review of the record reveals that the prosecutor merely argued that the police witnesses were worthy of belief. Witness credibility was a central issue in this case because defendant, testifying on his own behalf, conceded that he had heroin in his possession but adamantly denied having possession of the weapon, in direct contradiction to the testimony of Stewart and Jones. None of the prosecutor's comments indicate or implied that he had some special knowledge of the witnesses' truthfulness but rather consisted of proper comment on the issues. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Furthermore, the trial court instructed the jury that the lawyers' statements and arguments were not evidence, and jurors are presumed to follow the trial court's instructions, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004), so the prosecutor's comments did not deny defendant a fair and impartial trial. Accordingly, defendant has failed to demonstrate the existence of a plain error affecting his substantial rights.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant contends that he was denied the effective assistance of counsel. We disagree.

A. Standard of Review

Questions of ineffective assistance of counsel are governed by a mixed standard of review. First, where the trial court finds certain facts in relation to a claim of ineffective assistance of counsel, those findings are reviewed for clear error. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Second, whether the facts establish ineffective assistance of counsel involves a question of constitutional law, which is reviewed de novo. *Id.*

B. Analysis

Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797

(1994). With respect to the prejudice prong of the test, a defendant must “demonstrate a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (emphasis in original).

Defendant first contends that counsel was ineffective for failing to pursue the “search and seizure” issue before trial. As we previously ruled, defendant did not have a valid search and seizure complaint. Trial counsel was not ineffective for failing “to advocate a meritless position.” *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, the failure to raise this argument before the trial court did not constitute ineffective assistance of counsel.

Defendant also contends that trial counsel was ineffective for conceding defendant’s guilt of the possession of heroin charge at trial. This Court has held that conceding guilt of a lesser offense is presumed to be a matter of trial strategy. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Our courts will not second guess matters of trial strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). Here, defense counsel argued that defendant was being truthful by admitting possession of heroin, apparently attempting to bolster his argument that defendant was also telling the truth about not possessing a firearm. Had defendant been convicted only of the controlled substance offense, he could potentially have argued for a sentence of probation. See, generally, MCL 771.1(1). This contrasts greatly with the mandatory term of imprisonment of two years that accompanies a felony-firearm conviction. MCL 750.227b(1). As this Court will not second guess matters of trial strategy, we find that defendant has failed to demonstrate that he was denied the effective assistance of counsel.

V. CUMULATIVE ERROR

Finally, defendant contends that the cumulative effect of errors committed at trial deprived him of the right to a fair trial. We disagree.

A. Standard of Review

We review a defendant’s cumulative-error argument to determine if the combination of alleged errors denied defendant a fair trial.” *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001).

B. Analysis

“The cumulative effect of several minor errors may warrant reversal where the individual errors would not.” *Id.* at 388. However, in order to reverse on the basis of cumulative error, “the effect of the errors must [be] seriously prejudicial in order to warrant a finding that defendant was denied a fair trial.” *Id.* And a series of non-errors cannot aggregate to deny a defendant a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). Here, defendant has failed to demonstrate the existence of any error; therefore, there can be no cumulative effect of errors warranting reversal. *Id.*

Affirmed.

/s/ Henry William Saad

/s/ Mark J. Cavanagh

/s/ Bill Schuette